91-731

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HENRY F. K. KERSTING,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERNAL REVENUE SERVICE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

L. T. "BUTCH" BRADT
(Counsel of Record)
6303 Feldspar
Houston, Texas 77092-4716
(713) 681-2696
Fax: (713) 688-8212

MATTHEW K. CHUNG
Suite 1501
220 South King Street
Honolulu, Hawaii 96813
(808) 545-2060
Attorneys for Petitioner,
Henry F. K. Kersting

Of Counsel to Petitioner:
TERRENCE B. ROBINSON
One West Loop South, Suite 100
Houston, Texas 77027
(713) 736-3268

Alpha Law Brief Co. — 6113 Aletha Lane — Houston, Texas 77081 — 981-9000

QUESTIONS PRESENTED

(1) Are assessments made against a taxpayer under 26 U.S.C. Sections 6700 and 6701 penalties or taxes?

(2) Does the Anti-Injunction Act (26 U.S.C. Section 7421) bar a suit to enjoin collection of penalties assessed against a taxpayer under Title 26 U.S.C. Sections 6700 and 6701?

(3) Is Petitioner entitled to an evidentiary hearing on his suit to enjoin collection of penalties assessed against him under 26 U.S.C. Sections 6700 and 6701?

(4) Does it violate Due Process and Equal Protection requirements to deny Petitioner a pre-deprivation hearing on Petitioner's Due Process challenge to penalties assessed against him by the I.R.S. under 26 U.S.C. Sections 6700 and 6701?

(5) Are the procedures for administrative and judicial review provided under 26 U.S.C. Section 6703 constitutionally deficient?

(6) What is the test to be applied in determining whether Petitioner has suffered irreparable injury as a result of conduct of the I.R.S. in assessing penalties against him under 26 U.S.C. Sections 6700 and 6701 without affording a pre-deprivation hearing?

(7) What is the proper interpretation to be given to the provisions of 26 U.S.C. Section 6703 regarding payment of fifteen (15%) percent of the penalty as relates to being able to stay collection of the penalties assessed under Section 6701 and obtain judicial review?

(8) Is the term "abusive tax shelter" defined under the I.R.S. Code?

(9) What is the definition to be given to the term "tax period" as relates to penalties to be assessed under 26 U.S.C. Sections 6700 and 6701?

(10) What is the Statute of Limitations for penalties assessed under 26 U.S.C. Sections 6700 and 6701?

(11) Were the penalties assessed by the Internal Revenue Service against Petitioner barred, in whole or in part, by the Statute of Limitations?

(12) Must penalties assessed under 26 U.S.C. Sections 6700 and 6701 be assessed by year?

(13) May a District Court refuse to receive evidence on the irreparable injury which Petitioner will suffer if Petitioner's affidavit of irreparable injury is uncontroverted?

(14) Must a Petitioner state, in his affidavit of irreparable financial injury, each and every fact on which he bases his conclusion that he will suffer irreparable financial injury if he is denied a hearing to contest penalties assessed against him—especially when the affidavit is uncontroverted?

(15) May the District Court dismiss an entire case for lack of jurisdiction when part of the case involves return of property seized by the I.R.S. under a subpoena?

PARTIES

Petitioner-Appellant: Henry F. K. Kersting.

Respondent-Appellees: Internal Revenue Service and the United States of America.

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To the Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Henry F. K. Kersting ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which sustained an order of the United States District Court of Hawaii dismissing Petitioner's suit for injunctive relief to obtain a pre-deprivation hearing relating to penalties assessed against him by the Internal Revenue Service ("I.R.S.") under 26 U.S.C. Sections 6700 and 6701.

REPORT OF OPINIONS

The opinion of the Ninth Circuit Court of Appeals is not reported but is set forth in Appendix C.

The order of the United States District Court for the District of Hawaii is not a reported opinion and is set forth in Appendices A and B.

JURISDICTION

The decision sought to be reviewed herein was entered by the United States Court of Appeals for the Ninth Circuit on August 2, 1991, and is set forth in Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This case involves the question of Petitioner's constitutional right to a pre-deprivation hearing before having to pay penalties assessed against him by the I.R.S.; and whether the Anti-Injunction Act, 26 U.S.C. Section 7421(a), applies to and/or prohibits the issuance of a preliminary injunction against the I.R.S.'s collection of penalties assessed against Petitioner under I.R.C. Sections

STATUTES INVOLVED

The following statutes are involved in this case: 26 U.S.C. Sections 6501(a), 6671(a), 6672, 6700, 6701, 6703 and 7421; 28 U.S.C. Sections 2412 and 2462. These are set forth in Appendix D.

The following Constitutional provisions are involved in this case: the First and Fifth Amendments of the United States Constitution. These are set forth in Appendix D.

6700 and 6701 without the affordance of a pre-deprivation hearing when the percentage (15%) of the total penalties assessed that Petitioner must have paid within 30 days of assessment to secure his day in court amounts to approximately $581,789.54; and when failure to pay said amount requires payment of $3,878,463 plus interest before Petitioner can seek a refund and obtain his day in court. The case further involves the irreparable injury which will be caused to Petitioner due to his inability to pay the penalties assessed against him and the imminent denial of his right to Due Process and Equal Protection under the Fifth Amendment of the United States Constitution.

In October 1989, *without prior hearing or meaningful opportunity to be heard,* the I.R.S. issued two notices of penalties against Petitioner under 26 U.S.C. Sections 6700 and 6701, totaling $3,878,463 plus interest.[1]

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1. The first notice received by Petitioner, dated October 16, 1989, showed a "penalty assessment" under Section 6700, of $1,545,-201.00 for the "tax period December 31, 1988;" and indicated that the amount of the penalty for promoting an abusive tax shelter is the "greater of $1,000 or 20% of the gross income derived or to be derived from the activity."

In order for him to contest the penalty, the notice allowed Petitioner thirty (30) days from the date of the notice to pay "15% of the penalty and file a claim for refund on form 843." The notice further described the remedies after denial of the claim. The text ended with the words "[i]f you do not take these actions, you will have to pay the full amount shown below." On the "Return This Part . . ." portion of the notice were the words "Amount You Owe .....$1,545,201.00"

The second notice, imposed under Section 6701 and dated October 23, 1989, also identified as a Notice of Penalty Charge, showed an additional penalty assessment against Petitioner in the amount of $2,330,000.00, plus interest in the amount of $3,262.67 charged on the prior balance of $1,545,201.00, for a total balance due of $3,878, 463.67.

The second notice continued by saying that if Petitioner wanted

Being unable to pay 15% of the amounts shown as "penalty assessments," or approximately $581,769.53, within the required thirty (30) days to obtain his day in court; with no pre-deprivation hearing on the penalties, or even a meeting, much less any notice of the factual basis of the penalties, Petitioner invoked the equity jurisdiction of the District Court and filed suit against the United States and the I.R.S.

Petitioner's five count complaint raised claims challenging Sections 6700, 6701 and 6703 of the Code as a violation of Petitioner's constitutional rights.[2] Petitioner also filed a Motion for Preliminary Injunction.

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to contest the assessment, he had "30 days from the date of this notice to pay 15% of the penalty and file a claim for refund on form 843." The notice further warned: "[i]f you do not take these actions, you will have to pay the full amount shown below." The amount shown below on the "Return . . ." portion of the notice is follows: "Amount You Owe .....$3,878,463.67. This is the same amount shown on the notice as "Balance Due."

2. Count I alleged that Section 6703 violated Petitioner's right to procedural Due Process for failing to allow a predeprivation hearing prior to requiring payment of fifteen (15%) percent of the total assessment. The count further sought a predeprivation hearing and an order enjoining collection of the penalties assessed.

Count II challenged Sections 6700, 6701 and 6703 as being violative of the Due Process and Equal Protection Clauses of the United States Constitution as applied to Petitioner because the statutes provide no notice of what exactly is the prohibited conduct and because he can only get his day in court by paying nearly $600,000 within 30 days of assessment, as a prerequisite to filing a refund claim and thereby obtaining judicial review of the penalties assessed.

Count III sought to enjoin certain activities of the I.R.S. that chill or interfere with Petitioner's First Amendment rights of free speech. Count IV sought to enjoin the I.R.S. from interfering in Petitioner's Fifth Amendment right to liberty and property. Count V sought to force the I.R.S. to return documents which the I.R.S. subpoenaed from Petitioner in January, 1989, in a separate proceeding and which had not been returned--documents which were necessary to attempt to understand and respond to the penalty assessments imposed against Petitioner.

The District Court was presented with a complicated denial of Petitioner's constitutional right to Due Process, to notice and hearing. By Larry Tahara's declaration (*Infra*), Respondents admitted the arbitrary and capricious nature of the assessments against the Petitioner herein.

On November 13, 1989, within thirty days of the first assessment, a hearing was had on Petitioner's Motion for Preliminary Injunction. Petitioner supported his motion with three (3) affidavits and over 150 pages of exhibits. Petitioner attested to the demands contained in the two notices of penalty charge; his inability to afford or raise within 30 days the nearly $600,000, or 15% of the total penalty charge required by the notice before filing a refund claim and a challenge to the penalty assessments; and Petitioner attested to the irreparable injury which he would suffer by being forced into bankruptcy if he was denied a pre-deprivation hearing.

Petitioner's counsel, by affidavit, described, inter alia, the failure of the I.R.S. to have a pre-assessment meeting or hearing. The third affidavit provided an expert opinion by Joe Alfred Izen, Jr. Esq., that the term "abusive tax shelter" is undefined by the Code, and that the validity of deductions generated by Petitioner's corporations was before the United States Tax Court in *Dixon v. Commissioner,* Docket No. 83-9283. The pending decision in *Dixon* bears directly on whether such deductions generated by the corporations with which Petitioner is associated, if valid, could be considered "abusive."

Respondents served their opposing papers containing the Declaration of Larry Tahara ("Tahara"), the Revenue Agent generating the penalty notices. Tahara's declara-

tion showed that he based the assessment against Petitioner solely on the income of the various corporations with which Petitioner is associated. Tahara further stated that he had *no idea* what income Petitioner individually earned from the alleged promotion or from the corporations. Tahara assessed Petitioner individually just the same.

Specifically, Tahara stated that he based the assessment against Petitioner solely on the income of the various corporations with which Petitioner is associated. Tahara determined that the corporations with which Petitioner is associated took in some $10,000,000 in gross income from 1982 through 1988. To determine the amounts of the penalty assessments against Petitioner under Section 6700 and 6701, Tahara said he calculated the penalties by determining a figure:

> ". . . equal to 10% of the total fees (gross income) paid to Kersting's corporations during the period September 4, 1982, through July 17, 1984 and 20 percent of the amounts paid to Kersting's corporations during the period July 18, 1984 through December 31, 1988. In determining the amount of the Section 6701 penalty to be assessed in this case, I reviewed the interest statements sent to the investors and arrived at a penalty equal to $1,000 for each investor in the programs for each year. . . ."

Tahara then attested to a yearly breakdown of the penalties under both Sections 6700 and 6701 for each year from 1982 through 1988. Tahara conjectured what Petitioner might have made based on a percentage of the corporations' gross income; but he assessed Petitioner individually the Section 6700 penalty based on the total gross income of the corporations!

Respondents never contested Petitioner's claim that he did not have the nearly $600,000, that he could not raise such a sum, and that he has never earned or received the gross income necessary to arrive at the penalty assessed by the I.R.S. against him. Again, this Court should remember that Petitioner's affidavit of irreparable injury was uncontroverted by Respondents.

The District Court, sua sponte, dismissed the entire case for lack of subject matter jurisdiction, without affording Petitioner an evidentiary hearing. (Appendix B) In so acting, the Court didn't address the return of Petitioner's records from the I.R.S., or the attorney's fees incurred in briging the suit to obtain the return of Petitioner's records and property.

On appeal to the Court of Appeals for the Ninth Circuit, the appeals court determined that the Petitioner was required to pay 15% of $1,545,201 or $231,780.15, under Section 6700 and 15% of $1,000 ($150) for a single 6701 penalty.[3] The Ninth Circuit concluded that Petitioner's claim for return of documents was moot. The Court of Appeals also determined that Petitioner provided "no evidence irreparable injury would result" and therefore he had not met the requirements for avoiding the strictures of the Anti-Injunction Act.

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3. The Ninth Circuit's determination that Petitioner need pay only $150 of a single Section 6701 penalty to obtain judicial review and (impliedly) a stay of collection of the rest of the Section 6701 penalties, completely ignores the absence of any legal authority for this position. (See infra pages 9-10, n.4, and Substantive Due Process) The Ninth Circuit cannot create a remedy not authorized by Congress nor envisioned by a plain reading of Section 6703. The only way for Petitioner to obtain judicial review of all of the penalties while staying collection activities of all of the penalties is by payment of 15% of the entire penalty assessments within 30 days.

The Ninth Circuit affirmed the District Court's dismissal of Petitioner's suit without addressing whether assessments under 26 U.S.C. Sections 6700 and 6701 are penalties to which the Anti-Injunction Act does not apply.

Kersting petitioned this Court for a writ of certiorari to resolve the important constitutional issues raised by this case.

The jurisdiction of the District Court was predicated upon Title 28 U.S.C. Section 1331; Title 28 U.S.C. Sections 2201, 2202—the Declaratory Judgment Act; Title 5 U.S.C. Sections 701 - 706, the Administrative Procedure Act; the First and Fifth Amendments to the United States Constitution; Title 26 U.S.C. Sections 6700 - 6703 and 7609, et seq.; and, Title 28 U.S.C. Section 2412—the Equal Access to Justice Act.

ARGUMENT

A. Reasons For Granting The Writ.

This case is ripe for Supreme Court review to resolve the interpretation of an important Federal statute relating to the Due Process safeguards inherent in the purported "appeal rights" afforded after assessment of penalties by by the I.R.S. This case is also ripe for Supreme Court review to resolve a failure of the Ninth Circuit Court of Appeals to follow binding precedents of this Court. This case is also ripe for Supreme Court review to interpret the procedure to be used in assessing penalties by the I.R.S. in certain circumstances. This case is also ripe for Supreme Court review to determine whether Congress intended to except Sections 6700 and 6701 of the Code

from the statute of limitations. The statutory framework in question has a substantial impact on power of the I.R.S. to assess penalties and preclude taxpayers from obtaining pre- and/or post-deprivation hearings on these assessments. The statutory framework and the interpretation to be given thereto impact directly on First and Fifth Amendment rights. This Court has yet to rule on issues presented by this case and its guidance is required to resolve an admittedly difficult question on the itnerpretation of a statute which has a direct and meaningful impact on a significant segment of the public.

B. Statutory Framework.

The Internal Revenue Code, 26 U.S.C. Section 6700 authorizes the I.R.S. to impose penalties against persons who "promote abusive tax shelters." From 1982 to 1984 the penalty was the greater of $1,000 or 10% of the gross income derived or to be derived by such person from such activity. (Appendix D)

Section 6701 authorizes the I.R.S. to impose penalties against persons who "aid and abet the understatement of tax liability." The penalty is $1,000 with respect to any document relating to any taxpayer for any taxable period. (Appendix D) The term "taxable period" is not defined.

To obtain judicial review of the penalties, Section 6703 requires Petitioner to pay 15% of the amount of the penalties and file a claim for refund of the amount so paid within 30 days of the notice and demand of any penalty under Section 6700 or 6701. Failure to pay 15% of the penalties and the filing of a claim for refund within 30 days, bars Petitioner from obtaining judicial review of

the I.R.S. action until the full penalties and interest are paid. (Appendix D)[4]

C. Constitutional Deprivations.

1. Due Process Requirements.

"The right to be heard before being condemned to suffer grievous loss of any kind," whether loss of liberty, property or reputation, "is a principle basic to our society." *Mathews v. Eldridge,* 424 U.S. 319 (1976).

> "The Supreme Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."

Wolff v. McDonnell. 418 U.S. 539, 557-558 (1974). "[I]n order that they may enjoy that right (to a hearing) they must first be notified." *Fuentes, infra.*

> "Procedural Due Process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . . The fundamental requirement of Due Process is the *opportunity to be heard at a meaningful time and in a meaningful manner.*

Eldridge, supra, at pp. 332-33 (1976) [Italic Emphasis Supplied]; *Boddie v. Connecticut,* 401 U.S. 371 (1971); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

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4. Sections 6700, 6701 and 6703 lack any hearing requirement commensurate with Fifth Amendment Due Process. The only way to obtain judicial review and stay collection activities is to pay fifteen (15%) percent of the entire assessment within 30 days of the penalty notice and seek a refund. The only alternatives for judicial review without a stay are to pay the entire assessment, plus interest and sue for a refund, or file bankruptcy.

The I.R.S. penalty assessment of almost $3.8 Million is a significant property interest. Due Process requires that Petitioner receive notice and a hearing before he must pay the penalty. The I.R.S. notices required the payment of nearly $600,000 before Petitioner could file a claim for refund and obtain a hearing on the penalties. There is no law, rule, regulation or court case which allows Petitioner to stay collection activities and obtain judicial review of the assessments *without* payment of 15% of the entire penalty assessment against him. *See,* Note 3 and 4, *supra.* Petitioner was thus forced to sue for a hearing and to enjoin collection activity pending such a hearing under the principles shown below.

2. Right To Pre-deprivation Process.

Under the Constitution, Petitioner's claim to a pre-deprivation process must be determined considering three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The issue of whether Sections 6700, 6701 and 6703 provide adequate Due Process protection and/or requires *Eldridge* pre-deprivation hearing protection are matters of first impression for this Court. The Ninth Circuit has

previously applied *Eldridge* to these statutes, as noted below, but refused to apply their own precedent herein.

The Ninth Circuit's legal precedents for upholding a taxpayer's right to Due Process and a pre-deprivation hearing arise from fact situations very similar to the instant case. *Jolly v. United States,* 764 F.2d 642 (9th Cir. 1985); *Bond v. United States,* 872 F.2d 898, 900 (9th Cir. 1989).

In *Jolly, supra,* at p. 645, the Ninth Circuit considered Jolly's claim to pre-deprivation process in the context of penalties assessed against him for filing a frivolous tax return and found that such a claim must be examined considering the *Eldridge* three-part test noted above.[5] *Jolly* demonstrated no financial or other hardship from having to pay $75 (15% of $500) before obtaining judicial review of the I.R.S. assessments (while Petitioner here raises a Due Process challenge to the administrative and judicial procedures that would require him to pay nearly $600,000 before a meaningful opportunity to be heard could be had).

In applying the *Eldridge* test, the Ninth Circuit stated:

> "If the individual bringing a procedural Due Process challenge demonstrates "a likelihood of irreparable harm resulting from the lack of a pre-deprivation hearing," it is unlikely that the government will be able to demonstrate any public interest that will overcome the individual's interest, and some addi-

5. Unlike Petitioner, Jolly could turn to a long line of cases to know that his conduct constituted the filing of a "frivolous return" for purposes of Section 6702 before he filed same. The merits and validity of the investments promoted by Petitioner, however, have no explicit statutory or case law prohibition and remain at issue before the Tax Court.

> tional form of pre-deprivation process will probably be required. *In the absence of such a showing, however, Eldridge requires courts to "balance the governmental interest in [retaining] the existing process against the private interest that will be affected and the probability of erroneous deprivation associated with that process."*

Jolly at page 645 [Italic Emphasis Supplied], quoting *Kahn v. United States,* 753 F.2d 1208, 1219-20 (3rd Cir. 1985).

In simple terms, *Eldridge* and *Jolly* require that if the taxpayer demonstrates a likelihood of irreparable injury from the lack of a pre-deprivation hearing, "some *additional form of pre-deprivation process will probably be required.*" *Jolly* at 641 [Italic Emphasis Supplied] But the Ninth Circuit went further and explained "that *Eldridge's* three-part test must be applied in evaluating procedural Due Process challenges to Section 6703 *regardless of any favorable finding as to irreparable injury.*" *Jolly,* at 645, citing *Kahn, supra.*

Even if the taxpayer fails to demonstrate irreparable injury, the Court must still apply the three-part *Eldridge* test and "balance the governmental interest in retaining the existing process against the private interest" affected by the process, and the "probability of erroneous deprivation associated with that process." *Id.* Thus, *Jolly* required the District Court and the Ninth Circuit in this case to apply the *Eldridge* balancing test to Petitioner's claim even after finding that he did not show irreparable injury. Had they done so, they would have found the government's interest in the existing administrative procedure (i.e., questionable notice, no hearing, and no showing of the government's evidence against him) outweighed by

Petitioner's private interest in obtaining review of the penalties without first paying the nearly $600,000 required in this case and the clear risk of erroneous deprivation associated with the process. Obviously, the District Court and the Ninth Circuit misunderstood the import of *Jolly*.

The distinctions between *Jolly* and the instant case are obvious. The critical difference is the disparity in the size of the payment required ($75 versus $600,000) before obtaining judicial review of the assessments. This emphasizes the reasons to apply these authorities to the I.R.S.'s actions herein and grant the relief sought by Petitioner.

Finally, the Government's interest in retaining the existing procedures involved herein do not merit abrogating Due Process. The I.R.S. has not shown any public interest that overcomes Petitioner's individual interest herein, and some additional form of pre-deprivation process is therefore required. *Eldridge, supra,* requires courts to balance the governmental interest in [retaining] the existing process against the private interest that will be affected and the probability of erroneous deprivation associated with that process. The District Court was therefore bound to hold a hearing and apply the *Eldridge* test to Petitioner's claim.

3. Due Process Denials By A Cost Requirement.

This Court has—

> "[e]stablished that a statute or a rule may be held constitutionally invalid as applied when is operates to deprive an individual of a protected right . . . [j]ust as a generally valid notice procedure may fail to

> satisfy Due Process because of the circumstances of the defendant, so too *a cost requirement, valid on its face, may offend Due Process because it operates to foreclose a particular party's opportunity to be heard.*"

Boddie v. Connecticut, 401 U.S. 371, 379-380 (1971) [Italic Emphasis Supplied].

Further, the right of access to the courts springs from the First Amendment. *Ryland v. Shapiro,* 708 F.2d 967, 971-972 (5th Cir. 1983).

> ". . . [t]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

Respondents' conduct in assessing the penalties denied Petitioner the opportunity for judicial review of the assessments without forcing him into bankruptcy. This is an unparalleled interference with, and an abridgement of, Petitioner's First and Fifth Amendment rights, to petition for the redress of grievances, to Due Process and to Equal Protection.

By illegally lumping penalties attributable to seven separate years into the "tax period ended 12/31/88," Respondents set the amount that Petitioner must have paid within 30 days so high as to deny him access to a judicial review as contemplated under Section 6703. Petitioner is thus to suffer the "slings and arrows" of the I.R.S.'s collection activities without ever being able to obtain judicial review of the penalties unless he files bank-

ruptcy—while losing all his assets. Thus, without this Court's intervention he will also suffer constitutional deprivations unequaled in enormity at the hands of the I.R.S.

4. Substantive Due Process: Void for Vagueness.

Due Process requires that statutes give persons reasonable notice that their conduct is at risk, otherwise the statutes will fail for vagueness. *Maynard v. Cartwright,* 486 U.S. 356 (1988); *United States v. Powell,* 423 U.S. 87 (1975); *United States v. Mazurie,* 419 U.S. 544 (1975); *United States v. National Dairy Corp.,* 372 U.S. 29 (1963). Petitioner can only be punished for violation of *known* standards of conduct. *United States v. Dahlstrom,* 713 F.2d 1423 (9th Cir. 1983), *cert. denied,* 466 U.S. 980. Here, the Internal Revenue Code fails to define the term "abusive tax shelter," but penalizes Petitioner for its promotion.

The Due Process Clause requires this Court to examine Sections 6700 and 6701 to see if they gave Petitioner reasonable notice that he was engaging in prohibited conduct (especially when the merits of the alleged shelters have yet to be decided by the United States Tax Court); and whether the statutes afforded Petitioner a "meaningful hearing at a meaningful time." This Court should be mindful that nowhere contained in the Code is a definition of an "abusive tax shelter."

5. Irreparable Injury Through Constitutional Deprivation.

Petitioner has properly alleged a deprivation of Constitutional rights, which case authority holds constitutes irreparable injury as a matter of law.

As stated by the Ninth Circuit:

> "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."

Gutierrez v. Municipal Ct. of the S.E. Judicial District, 838 F.2d 1031 (9th Cir. 1988); *See also Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Ross v. Meese,* 818 F.2d 1132 (4th Cir. 1987); and *International Association of Firefighters, Local 2069 v. City of Sylacauga,* 436 F. Supp. 482 (N.D. Ala., E.D. 1977).

Having been afforded no pre-deprivation hearing on the penalties and upon failure to pay the 15% required by Section 6703, the denial of a post-deprivation hearing was assured. Thus, the District Court and the Ninth Circuit should have held, as this Court should hold, that the constitutional deprivations suffered by Petitioner constitute irreparable injury as a matter of law.

6. Lack of Adequate Due Process Safeguards.

The risk of erroneous deprivation in this case is great. When the I.R.S. issues these penalties, the merits of the underlying "shelter" often remain to be determined. This is not a question of a taxpayer's self-assessment for purposes of a frivolous return penalty. *Jolly, supra.* Here the I.R.S. must determine not only Petitioner's gross income from the activity, but also the number of documents allegedly prepared by him. The facts of the assessments are complicated, involving over seven years, thirty-five corporations, thousands of other taxpayers, and allegedly millions of dollars in gross revenues. But the I.R.S. afforded Petitioner *no* meaningful opportunity to be heard before or

after assessing the nearly $4,000,000 in panalties against him.

The Internal Revenue Code, its rules and regulations fail to provide any other procedure for obtaining judicial review and a stay of collection activities, other than payment of 15% of the entire assessment within 30 days and the filing of a claim for refund. Even if you concede that Petitioner could pay $150 of one Section 6701 penalty and thereby obtain a stay of collection activities and judicial review of that *one penalty assessment,* it ignores Petitioner's inability to thereby stay collection activities and obtain judicial review of the other 2,329 Section 6701 penalties assessed against him. *See,* Notes 3 and 4 *supra.*

There is no procedure to allow a taxpayer to require the I.R.S. to hold a pre-assessment hearing. The only procedure to stay collection of the entire assessment and obtain judicial review of the I.R.S. assessments under Sections 6700 and 6701 is through payment of 15% of the entire assessment within thirty (30) days. Failing that, the only other statutory remedies available to the taxpayer are to pay the entire assessment plus interest and sue for a refund, or to file bankruptcy.[6]

Unlike *Bob Jones University v. Simon,* 416 U.S. 725 (1974), the Section 6703 procedures complained of herein do not—

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6. This is obviously no remedy since if the taxpayer can pay almost $4,000,000 after 30 days, the taxpayer should be able to pay $600,000 within 30 days of assessment. The problem arises when the taxpayer cannot pay the nearly $600,000 within 30 days because then the taxpayer can only obtain judicial review by filing of bankruptcy. Otherwise, the I.R.S. can levy upon and sell all of the taxpayer's assets and he will never be able to raise the entire assessment amount, much less obtain judicial review.

> "offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's [penalty assessments] . . ."

In contrast, these procedures assure Petitioner will be afforded *no* opportunity to litigate their legality at all.

B. The Anti-Injunction Act Does Not Bar This Action.

The Anti-Injunction Act, 26 U.S.C. Section 7421, (the "Act") does not apply and an injunction may issue where the tax sought to be enjoined is in reality a penalty or special and extraordinary circumstances are present. *Schenley Distillers, Inc. v. Bingler,* 145 F.Supp. 517, 520-21 (W.D. Penn., 1956), *aff'd* 353 U.S. 933. The Act preceded *Schenley, supra.*

The Act does not prevent the granting of relief by way of injunction where an assessment, in the form of a tax, is in reality a penalty in the nature of punishment. *Lipke v. Lederer,* 259 U.S. 557 (1922); *Regal Drug Corp. v. Wardell,* 260 U.S. 386 (1922). These cases, while of narrow scope, are still good law, as noted in *Bob Jones University v. Simon,* 416 U.S. 725, 743 (1974) [relying upon *Graham v. Dupont,* 262 U.S. 234 (1923)].

The District Court and the Ninth Circuit held that the Anti-Injunction Act barred Petitioner's suit. Petitioner disagrees. The I.R.S. assessed a penalty against him, not a tax. There is no basis in law or fact for the lower Courts' determination that the amounts assessed were *taxes,* not penalties, thereby allowing the Anti-Injunction Act to bar this suit.

Petitioner also can find no authority that applies the Act to preclude Due Process, and to deny notice and a

hearing on the merits of the tax or penalty. Petitioner sought to enjoin collection of the statutorily required 15% until he received a pre-deprivation hearing, or a full hearing on the merits of the assessment. The District Court and the Ninth Circuit, however, applied the Act to deny the injunction, thereby enforcing the assessments and requiring the 15% payments before allowing a hearing on the merits. Congress never intended to use the Act to deny Due Process or Equal Protection. But it happened here.

7. Sections 6700 and 6701 Assess Penalties—Not Taxes.

The clear reading of Sections 6700 and 6701, with the legislative history of these statutes, shows that these statutes deal with penalties—not taxes.

> "When by its very nature the imposition is a penalty, it must be so regarded. . . . It lacks all of the ordinary characteristics of a tax, whose primary function "is to provide for the support of the government" and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty."

Lipke, supra, at pages 562.

Title 26 U.S.C. Section 6671 (Appendix D), does not make the Section 6700 and 6701 penalties taxes, it states instead that they ". . . shall be assessed and collected in the same manner as taxes." This is exceedingly different from Chapter 68, Subchapter A (Title U.S.C. §§ 6651, et seq.), wherein the "penalty" is added to and becomes part of the tax.

Title 26 U.S.C. Section 6672 (Appendix D) is also not dispositive of the issue before the Court, since that sanction, although denominated a penalty, is merely a tax collection device. *Botta v. Scanlon,* 314 F.2d 392 (2nd Cir. 1963); *United States v. Abrahams,* 312 F.Supp. 1035 (S.D. N.Y. 1970); *United States v. Pridgen,* 403 F.Supp. 1109 (S.D. N.Y. 1975).

8. Petitioner's Suit Falls Within Anti-Injunction Act Exceptions.

The District Court and the Ninth Circuit adopted the government's arguments that penalties assessed pursuant to Sections 6700 and 6701 of the Code are deemed to be taxes, and thereby applied the Anti-Injunction Act to dismiss Petitioner's entire case. Assuming, *arguendo,* that the Anti-Injunction Act does apply to said penalties, the Courts hereunder erred by failing to find that Petitioner's claims fit within judicial exceptions to the Act.

The standards for exception to the Anti-Injunction Act are set out in *Bob Jones University v. Simon,* 416 U.S. 725, 736-37 (1974) (plaintiff must show irreparable injury and "certainty of success on the merits.") and in *Enochs v. William Packing & Navigation Co.,* 370 U.S. 1, 7 (1962) (A preliminary injunction should issue only "if it is clear under the circumstances that under no circumstances could the Government prevail"). The courts erred in failing to find that Petitioner's claims met said standards, for as shown herein, Petitioner showed both irreparable injury and his certainty of success on the merits.

Under an exception to the Anti-Injunction Act one must show that "equity jurisdiction otherwise exists." Respondents have argued that Petitioner "clearly has an adequate remedy available in the form of a refund suit."

As stated above, Petitioner was required to pay nearly $600,000 within 30 days in order to obtain this supposed remedy (which he was not able and is still not able to pay). It requires a great "leap of faith" to pretend that this could ever be considered an *adequate* remedy. Surely the term "adequate" must imply some practical ability by a plaintiff to access the proposed remedy. Neither Petitioner, nor anyone else, could reasonably be asked to meet such a financial burden in such a short time in search of redress by the courts and yet realistically be said to have been afforded an "adequate" remedy. Petitioner is simply unable to pay such an exorbitant amount. This Court should remember that this exorbitant amount was assessed in clear derogation of statute and controlling case law. *Bond, supra.* Now the Respondents would use this improper and constitutionally invalid assessment to insure Petitioner's inability ever to challenge the assessments' unconstitutionality.

Again, as this honorable Court has stated—

> "[a] cost requirement, valid on its face, may offend Due Process because it operates to foreclose a particular party's opportunity to be heard."

Boddie, supra, at p. 380.

Clearly, a requirement that so effectively forecloses one's opportunity to be heard negates any argument of "adequate" remedy.

a. Likelihood of Irreparable Injury to Petitioner.

Irreparable injury is the essential prerequisite for injunctive relief in any case. This Court has stated:

> "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."

Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-507 (1959).

The denial of Due Process, whether a full hearing on the merits or a pre-deprivation hearing, for Petitioner, coupled with the imminent denial of subsequent recourse in the courts clearly results in irreparable injury to Petitioner. Petitioner was arbitrarily and capriciously assessed penalties by the I.R.S., then required to pay a percentage amounting to almost $600,000 (which he and clearly very few people could be expected to be able to raise in the (30) thirty days allotted under Section 6703). Upon his failure to pay this exorbitant amount, Petitioner was automatically required to pay $3,878,463 in total penalties plus interest without any further recourse. Clearly, this is effectively a deprivation of Due Process and Equal Protection amounting to injury of an irreparable nature where Petitioner is required to pay such an exorbitant amount without any further redress in the courts. This is particularly so, when the I.R.S. made no challenge to Petitioner's verified assertion of his inability to pay the penalty assessment percentage or his being forced into bankruptcy if he is denied a pre-deprivation hearing.

b. Financial Injury May Constitute Irreparable Harm.

While the Due Process deprivations suffered by Petitioner sufficiently evidence irreparable injury, case authority makes it clear that irreparable injury may also be shown in the form of financial harm. *Doran v. Salem Inn,*

Inc., 422 U.S. 922, 932 (1975). Contrary to the Ninth Circuit's determination that such harm will not constitute irreparable injury, this Court, as well as other Circuit Courts, have clearly determined otherwise.

The District Court and Ninth Circuit's cite this Court's decision in *Sampson v. Murray,* 415 U.S. 61 (1974) to support their decisions. The reliance on this decision is misguided in that the facts of *Sampson v. Murray* differ significantly from those presented here by Petitioner. In *Sampson,* the Respondent's *unverified* complaint alleged merely that "she might be deprived of her income for an indefinite period of time." This alleged temporary deprivation of income in *Sampson* cannot be equated with the imminent threat of bankruptcy and financial ruin faced by Petitioner herein, especially in light of the continued collection activities which have occurred durng the last two years. Indeed this Court has ruled in *Doran v. Salem, Inc., supra,* that where—

> ". . . respondents alleged (and petitioner did not deny) that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy, . . ."

this type of injury sufficiently meets the standards for granting injunctive relief.

Several Circuit Courts have recognized this form of irreparable harm as well. The Fifth Circuit in *Atwood Turnkey Drilling v. Petroleo Brasiliero,* 875 F.2d 1174 (5th Cir. 1989) found injunctive relief appropriate *where no evidence was submitted to contradict* the claim that respondent would be forced into bankruptcy. The Fifth Circuit stated that while it is the general rule that injunctive relief is inappropriate where harm is strictly financial,

> "an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business."

Id. at 1179. [Citations Omitted] *See* generally, *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th 1971); *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986).

As for the District Court's and Ninth Circuit's conclusion that some additional form of documentation is required for Petitioner's assertion of financial injury, there is no basis in law for such a requirement. This is particularly so in light of Respondents' failure to contradict Petitioner's assertion of financial injury. *See Doran v. Salem Inn, Inc., supra,* at 2568; and *Atwood Turnkey Drilling v. Petroleo Brisiliero, supra,* at 1179. Thus, Petitioner's allegations of imminent financial ruin clearly refute the lower Courts' finding of no irreparable injury here.

c. Success On The Merits.

The second requirement for exception under Anti-Injunction Act analysis is the certainty of success on the merits. Pre-enforcement injunction may be granted only "[i]f it is clear that under no circumstances could the Government ultimately prevail." *Enochs, supra,* at p. 7. On the merits, clearly even the Respondents cannot establish their claim of a proper penalty assessment against Petitioner.

There are several fatal defects in the Government's case. According to Tahara, the penalties were assessed against Petitioner based on the income to corporations with which Petitioner is associated. The assessment was therefore made in contravention of the statutes and rele-

vant case law. *Jolly, supra,* and *Bond, infra.* Sections 6700 and 6701 require penalties to be assessed upon the gross income to the promoter, not upon the income to corporations with which the promoter is associated. *Bond v. United States,* 872 F.2d 898, 900 (9th Cir. 1989). *Respondents' previous admission that they have no idea what income Petitioner has derived from the alleged promotion* is further evidence of the arbitrary and capricious nature of the assessment in this case.

Respondents have judicially admitted that the penalties against Petitioner under Section 6700 were assessed by attributing the involved corporations' entire income to Petitioner, thereby ignoring the corporate form. It is important for this Court to note that of the corporations ostensibly involved, Petitioner owns no shares therein and all are widely held.

Under Section 6700, a penalty for organizing or promoting abusive tax shelter is assessed as "the greater of $1,000 or 20% of the gross income *derived or to be derived by such person* from such activity." 26 U.S.C. 6700(a) [Emphasis Supplied]. (Appendix D) *See Gates v. U.S.,* 874 F.2d 584 (8th Cir. 1989); also *Spriggs v. U.S.,* 660 F.Supp. 789 (E.D. Va. 1987).

> "The statute does not provide an alternative in the amount of $1000 for each sale of an investment, much less for another alternative . . . invented by the I.R.S. for Appellant's case."

Weir v. U.S., 716 F.Supp. 574 (N.D. Ala. 1989).

There is also no provision in the statutes for "lumping" all the penalties (covering a seven year period) into the "tax period ended 12/31/88, as was done in this case.

The assessments have thus clearly been made illegally and cannot stand upon judicial review.

d. Applicable Statute of Limitations.

If the assessments against Petitioner are in fact for the years set forth in Tahara's declaration (*supra*), then part of the assessments are void, ab initio, as having been assessed after the running of the applicable statute of limitations, 26 U.S.C. Section 6501 (three year statute of limitations) or 28 U.S.C. Section 2462 (general five year statute of limitations). (Appendix D) This Court must determine the proper statute of limitations to be applied in this case.

In relevant part, 28 U.S.C. Section 2462 reads:

> "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ."

Respondents argue that without a specific statute of limitations, none should be implied of imposed. Although Sections 6700 and 6701 were enacted with no express statute of limitations provided, in 26 U.S.C. Section 6671(a), it states that penalties "shall be assessed and collected in the same manner as taxes," and Section 6501 (a) provides that "any tax imposed by this title shall be assessed within 3 years *after the return was filed . . .*" Thus, an evident argument is that the statute of limitations for Section 6700 penalties should be 3 years. While Petitioner does contend that this is the appropriate limita-

tion to be applied, an alternative is recognized and mandated by law.

As 28 U.S.C. Section 2462 makes plain, suit for enforcement of any penalty must be commenced within five (5) years from the date when claim first accrued, except as otherwise provided. While failure to provide a specific limit might suggest no limit of time, as stated in *H.P. Lambert Co. v. Secretary of Treasury,* 354 F.2d 819 (C.A. 1, 1965)—

> "the general policy of statutes of limitations is so deeply ingrained in our legal system that a period of limitations made generally applicable to such proceedings, as is Section 2462, is not to be avoided unless that purpose is made manifestly clear."

There is no indication that Congress intended to exclude Section 6700 and 6701 penalties from the operative effect of either the general statute of limitations embodied in 28 U.S.C. Section 2462 or the three year statute of limitations relating to the assessment and collection of taxes, 26 U.S.C. Section 6501.

Section 6501(a) depends on the filing of a tax return. Section 6700 assessments clearly do not depend on the filing of a tax return. Rather, assessment of Section 6700 penalties occur after alleged abusive conduct prohibited by Section 6700 occurs. The I.R.S. has been aware of the alleged activities of Petitioner since before the effective date of the penalty statutes involved herein, yet as attested to by Tahara, penalties have been assessed against Petitioner under both Sections 6700 and 6701 for each year from 1982 through 1988.

Whether this Court should accept the view that a 3 year or the general 5 year period of limitations apply, clearly the assessments made by Respondents are in derogation of the statutes of limitation.[7]

Each of the aforesaid defects is singularly fatal to the Respondents' case. There is no acceptable rationale for the purported penalty assessments made by Respondents. Any arbitrary and capricious tax assessment, without any statutory basis, is void *ab initio*. *See Weir v. U.S.*, 716 F.Supp. 574 (N.D. Ala. 1989). The I.R.S. cannot justify the unjustifiable. Thus, even under the most liberal view of the law and facts, "under no circumstances could the Government ultimately prevail" in the imposition of the penalties assessed against Petitioner.

D. Return of Seized Materials.

Irrespective of whether Petitioner's attempt to enjoin collection of the penalties assessed against him was barred by the Anti-Injunction Act, Petitioner's claim for the return of the items subpoenaed from him by the I.R.S. plus his claim for attorney's fees for having to bring the suit, were not barred and the District Court had jurisdiction to entertain same. *Von der Ahe v. Howland,* 508 F.2d 364 (9th Cir. 1974).

After the hearing on November 13, 1989, the I.R.S. returned to the Petitioner what they represented to be the items subpoenaed from the Petitioner and which were the subject of Petitioner's claim for mandatory injunctive

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7. This Court should note that the Respondents are advancing inconsistent positions with respect to the statute of limitations for the I.R.S. cannot treat the penalties as taxes for the purposes of refund and the application of the Anti-Injunction Act while treating the penalties as penalties for the purposes of the statute of limitations.

relief for their return. Petitioner disputes that all items were returned to him by the I.R.S. The District Court, however, must retain continuing jurisdiction to completely resolve the claim, and ensure that all Petitioner's records are returned. Thereafter, the Court has jurisdiction to assess attorneys fees and costs in Petitioner's favor for bringing the claim for return of his records under the Equal Access to Justice Act, 28 U.S.C. Section 2412 (Appendix D).

CONCLUSION

For all the reasons stated herein, this petition should be granted and a writ of certiorari should issue to review the decision below.

Respectfully submitted,

L. T. "BUTCH" BRADT
(Counsel of Record)
6303 Feldspar
Houston, Texas 77092-4716
(713) 681-2696

MATTHEW K. CHUNG
Suite 1501
220 South King Street
Honolulu, Hawaii 96813
(808) 545-2060

TERRENCE B. ROBINSON
(Of Counsel to Petitioner)
One West Loop South, Suite 100
Houston, Texas 77027

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 89-00860 ACK

HENRY F.K. KERSTING,
Plaintiff,

v.

UNITED STATES OF AMERICA AND
COMMISSIONER OF INTERNAL REVENUE,
Defendants.

Filed Nov. 15, 1989

JUDGMENT

This court denied Plaintiff's Motion for Preliminary Injunction. This court, sua sponte, dismissed the action for lack of subject matter jurisdiction. Accordingly, JUDGMENT IS HEREBY ENTERED FOR DEFENDANTS.
IT IS SO ORDERED.

/s/ SPENCER WILLIAMS
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 89-00860 ACK

HENRY F.K. KERSTING,
Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants.

Filed Nov. 15, 1989

ORDER DENYING PRELIMINARY INJUNCTION

This action came before this court on the Plaintiff's Motion for Preliminary Injunction. The Internal Revenue Service ("IRS") has assessed penalties against plaintiff under sections 6700 and 6701 of the Internal Revenue Code (the "Code"). Plaintiff seeks a preliminary injunction against the IRS to enjoin the IRS from assessing and/or collecting any part of the penalties assessed against him under sections 6700 and 6701 of the Code. Plaintiff argues that the denial of a pre-assessment review violates his rights to due process, equal protection, and first amendment rights. Having considered the pleadings and arguments, this court HEREBY DENIES the motion and DISMISSES the suit for lack of subject matter jurisdiction.

DISCUSSION:

The Anti-Injunction Act, section 7421(a) of the Code states that "[n]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person whether or not such person is the person against whom such tax was assessed." Penalties are treated as taxes for these purposes. Section 6171(a) of the Code.

An exception to the Anti-Injunction Act exists in which the plaintiff can show irreparable injury and "certainty of success on the merits." *Bob Jones University v. Simon,* 416 U.S. 725, 736-37 (1974). A preliminary injunction should issue only "if it is clear under the circumstances that under no circumstances could the Government prevail." *Enoch v. Williams Packing & Navigation Co.,* 370 U.S. 1, 7 (1962).

Plaintiff has failed to show irreparable injury if the penalties are assessed. Plaintiff claims only that the penalties will cause "financial ruin forever," but he has submitted no supporting documentation to prove his financial status.

Plaintiff also cannot prove that the government has no chance of winning. Currently, the tax court in a related case, *Dixon v. Commissioner,* Docket No. 9382-83, has been deliberating for a few months after a lengthy trial of the investors in plaintiff's investment plans. The government withstood summary judgment motions in the *Dixon* case. It is clear that although there is a slight chance that plaintiff's investment plans might be proven valid, there is no "certainty" that the government will fail to show that plaintiff's tax schemes are illegal.

Therefore, the plaintiff cannot meet Anti-Injunction Act applies, and this court must dismiss for lack of subject matter jurisdiction. *Enoch v. Williams,* 370 U.S. at 7.

Accordingly, this court HEREBY DISMISSES the case for lack of subject matter jurisdiction.

IT IS SO ORDERED.

/s/ SPENCER WILLIAMS
United States District Court

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-16459
D.C. NO. CV-89-0860-ACK

HENRY KERSTING,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA and
COMMISSIONER INTERNAL REVENUE SERVICE,
Defendants-Appellees.

Filed August 2, 1991

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted October 5, 1990
San Francisco, California

BEFORE: SCHROEDER, BRUNETTI, Circuit Judges,
and BREWSTER**, District Judge

Henry Kersting appeals from an order of the District Court for the District of Hawaii dismissing *sua sponte*,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

** Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

for lack of subject matter jurisdiction, his action against the Internal Revenue Service and the United States. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. *Background*

In October 1989 the Internal Revenue Service ("IRS") assessed penalties against Kersting for promoting abusive tax shelters. Appellant was assessed $1,545,201 under 26 U.S.C. § 6700 and $2,330,000 under 26 U.S.C. § 6701. The procedures in the Internal Revenue Code allowing a taxpayer to contest income or estate assessments in tax court without first paying the tax, §§ 6211-6213, do not apply to § 6700 and 6701 penalties. Under § 6703, a taxpayer's sole remedy in the case of §§ 6700 and 6701 assessments is to pay fifteen percent of the penalty within thirty days and then to file a claim for refund with the IRS, and upon disallowance of that claim, to bring a refund action in district court. For § 6700 penalties, the taxpayer is required to pay fifteen percent of the entire penalty to reach federal court. For § 6701 penalties, the taxpayer may pay fifteen percent of a single assessment (i.e., $150) and then file a refund action to determine the legality of all the § 6701 penalties.[1]

Instead of complying with the procedures set out in § 6703, Kersting filed suit in federal district court. His complaint alleged (a) that the § 6703 procedural requirements violate due process and equal protection, and (b) that §§ 6700 and 6701 violate due process and

1. In this case, Kersting was required to pay fifteen percent of $1,545,201 ($231,780.15) under § 6700, and fifteen percent of $1,000 ($150) for a single § 6701 penalty. Kersting was assessed a total of $2,330,000 under § 6701.

equal protection. Kersting asked the court to declare the Code provisions unconstitutional and to issue an injunction enjoining the IRS from collecting the assessments.[2]

The district court denied Kersting's motion for preliminary injunction and dismissed *sua sponte* the action in its entirety for lack of subject matter jurisdiction. Under the provisions of the Anti-Injunction Act, 26 U.S.C. § 7421, the court held that Kersting could not maintain a suit to restrain the assessment or collection of the section 6700 or 6701 penalties. Therefore, the court found that it was without jurisdiction to consider the case.

The court rejected Kersting's argument that it should hear the case under a judicially created exception to the Anti-Injunction Act. That exception permits an action to restrain the assessment or collection of a tax when a taxpayer demonstrates a certainty of success on the merits and that irreparable injury will result if the action is precluded. *Enoch v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962); *Elias v. Connett*, 908 F.2d 521, 526 (9th Cir. 1990). The court found Kersting made no showing the assessment would cause him irreparable injury. The court also held Kersting failed to demonstrate a certainty of success on the merits.

II. *Standard of Review*

We review the district court decision to dismiss for lack of subject matter jurisdiction de novo. *Kruso v.*

2. Kersting also sought return of various documents from the government. As these documents were returned before the matter was considered by the district court, we hold Kersting's claim on appeal with regard to these documents is moot.

International Tel. and Tel., 872 F.2d 1416, 1421 (9th Cir. 1989).

III. *Discussion*

We need not reach the question whether Kersting was certain to succeed on the merits because we agree with the district court he provided no evidence irreparable injury would result. To demonstrate irreparable harm for the purpose of avoiding the strictures of the Anti-Injunction Act, it is necessary to demonstrate something more than "mere monetary harm or financial hardship. . . ." *Elias*, 908 F.2d at 526. Indeed, to satisfy this prong of the Enochs exception, it is necessary to demonstrate that the harm resulting from forcing Kersting to protest the assessments in accordance with the procedure set out in 26 U.S.C. § 6706 is not capable of redress. As the Supreme Court has observed:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (1958)) (emphasis original in *Virginia Jobbers*).

In this case, the district court stated, "Plaintiff has failed to show irreparable injury if the penalties are assessed. Plaintiff claims only that the penalties will cause 'financial ruin forever,' but he has submitted no supporting documentation to prove his financial status." *Order*

Denying Preliminary Injunction at 2. Our independent review of the record has revealed no evidence of harm beyond "mere financial hardship." Indeed, at trial, Kersting alleged that he did not have, and was unable to raise sufficient funds to comply with § 6703. *Affidavit of Henry Kersting,* Excerpts of Records at B, ¶¶ 13-14. We therefore conclude the Anti-Injunction Act properly was applied in this case, and thus the district court was without jurisdiction to consider the matter.

AFFIRMED.

APPENDIX D

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. § 6501. LIMITATIONS ON ASSESSMENTS AND COLLECTION

(a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall

be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

26 U.S.C. § 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES

(a) Penalty assessed as tax.—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 U.S.C. § 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX

(a) General rule.—Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully accounts for and pay over such tax or will-

fully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.—

(1) In general.—If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person—

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty.

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Suit must be brought to determine liability for penalty.—If, within 30 days after the day on on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a pro-

ceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond.—The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1½ times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection.—The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary hibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection.—If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

26 U.S.C. § 6700. PROMOTING ABUSIVE TAX SHELTERS, ETC.

(a) Imposition of penalty.—Any person who—

(1)(A) organizes (or assists in the organization of)—

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes (in connection with such organization or sale)—

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter,

shall pay a penalty equal to the greater of $1,000 or 20 percent of the gross income derived or to be derived by such person from such activity.

(b) Rules relating to penalty for gross valuation overstatements.—

(1) *Gross valuation overstatement defined.*—For purposes of this section, the term "gross valuation overstatement" means any statement as to the value of any property or services if—

(A) the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and

(B) the value of such property or services is directly related too the amount of any deduction or credit allowable under chapter 1 to any participant.

(2) Authority to waive.—The Secretary may waive all or any part of the penalty provided by subsection (a) with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

(c) Penalty in addition to other penalties.—The penalty imposed by this section shall be in addition to any other penalty provided by law.

26 U.S.C. § 6701. PENALTIES FOR AIDING AND ABETTING UNDERSTATEMENT OF TAX LIABILITY

(a) Imposition of penalty.—Any person—

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document in connection with any matter arising under the internal revenue laws,

(2) who knows that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) will result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) Amount of penalty.—

(1) In general.—Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) Corporations.—If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) Only 1 penalty per person per period.—If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no

taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

(c) Activities of subordinates.—

(1) In general.—For purposes of subsection (a), the term "procures" includes—

(A) ordering (or otherwise causing) a subordinate to do an act, and

(B) knowing of, and not attempting to prevent, participation by a subordinate in an act.

(2) Subordinate.—for purposes of paragraph (1), the term "subordinate" means any other person (whether or not a director, officer, employee, or agent of the taxpayer involved) over whose activities the person has direction, supervision, or control.

(d) Taxpayer not required to have knowledge.—Subsection (a) shall apply whether or not the understatement is with the knowledge or consent of the persons authorized or required to present the return, affidavit, claim, or other document.

(e) Certain actions not treated as aid or assistance.—For purposes of subsection (a)(1), a person furnishing typing, reproducing, or other mechanical assistance with respect to a document shall not be treated as having aided or assisted in the preparation of such document by reason of such assistance.

(f) Penalty in addition to other penalties.—

(1) In general.—Except as provided by paragraph (2), the penalty imposed by this section shall be in addition to any other penalty provided by law.

(2) Coordination with return preparer penalties.—No penalty shall be assessed under subsection (a) or (b) of section 6694 on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

26 U.S.C. § 6703. RULES APPLICABLE TO PENALTIES UNDER SECTIONS 6700, 6701, AND 6702

(a) Burden of proof.—In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

(b) Deficiency procedures not to apply.—Subchapter B of chapter 63 (relating to deficiency procedures) shall not apply with respect to the assessment or collection of the penalties provided by sections 6700, 6701, and 6702.

(c) Extension of period of collection where person pays 15 percent of penalty.—

(1) In general.—If, within 30 days after the day on which notice and demand of any penalty under section 6700, 6701, or 6702 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2).

Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Person must bring suit in district court to determine his liability for penalty.—If, within 30

days after the day on which his claim for refund of any partial payment of any penalty under section 6700, 6701, or 6702 is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the person fails to begin a proceeding in the appropriate

United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

(3) Suspension of running of period of limitations on collection.—The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

26 U.S.C. § 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code[1] in respect of any such tax.

28 U.S.C. § 2412. COSTS AND FEES

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

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1. So in original. A comma probably should appear here.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized

statement from any attorney or expert witnesses representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensataion for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability

of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501 (c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such oraginzation or cocooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards,

the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

28 U.S.C. § 2462. TIME FOR COMMENCING PROCEEDINGS

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

No. 91-731

In the Supreme Court of the United States

OCTOBER TERM, 1991

HENRY F.K. KERSTING, PETITIONER

v.

UNITED STATES OF AMERICA and
COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Anti-Injunction Act, 26 U.S.C. 7421, bars petitioner's suit to enjoin the collection of penalties imposed under the Internal Revenue Code.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-9a) and the order of the district court (Pet. App. 2a-4a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1991. The petition for a writ of certiorari was filed on October 31, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner has a documented history of promoting tax shelters of dubious validity.[1] From 1982 through 1988, petitioner and corporations controlled by him had gross income in excess of $10,000,000 from the promotion and sale of participations in tax shelters (Pet. 6). Section 6700 of the Internal Revenue Code imposes a penalty against the promoter of an abusive tax shelter equal to the greater of $1,000 or 20% (10% for years prior to 1984) of the gross income derived by the promoter from the shelter. 26 U.S.C. 6700. Section 6701 imposes a penalty against any person who, by aiding in the preparation of any tax return, causes a tax liability to be understated; a separate penalty of $1,000 may be assessed for *each* taxable year with respect to *each* person whose return is understated through the actions of the aider and abettor. 26 U.S.C. 6701(b)(3). On October 16, 1989, petitioner was assessed an aggregate penalty of $1,545,201 under Section 6700 (Pet. App. 6a). On October 23, 1989, petitioner was assessed an aggregate penalty of $2,330,000 under Section 6701 (*ibid.*).[2]

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[1] See *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990). Those shelters purported to generate substantial interest deductions for the participants when, in fact, the transactions that supposedly created the interest payments were circular loans between related entities that gave only the appearance, but not the substance, of a transfer of funds. In *Pike* v. *Commissioner*, 78 T.C. 822 (1982), the court concluded that similar deductions claimed by petitioner's investors were not allowable because petitioner's program did not create any true indebtedness and no interest was in fact paid.

[2] The Section 6700 penalty was based on the appropriate percentage of gross income for each taxable period from 1982 through 1988. The Section 6701 penalties were based on the

The procedures under the Code that allow a person to contest a deficiency in income, estate or gift tax in the Tax Court prior to paying the tax (26 U.S.C. 6612, 6213) do not apply with respect to penalties assessed under Section 6700 and Section 6701. See 26 U.S.C. 6703(b). When a Section 6700 penalty assessment is made, Section 6703(c) instead provides that the person assessed may pay 15% of the amount of the penalty within 30 days of notice and demand, file a claim for refund, and upon disallowance of the claim, file suit for refund in district court. After the expiration of the 30-day period, the full penalty must be paid before administrative and judicial review may be obtained. Similarly, a person assessed Section 6701 penalties may, by paying 15% of one such penalty ($150), file a claim for refund and, upon administrative disallowance of the claim, file a refund suit. Alternatively, a person may challenge the validity of a penalty by defending an enforcement suit or by suing for a refund following collection of the tax.

2. Petitioner did not avail himself of those procedures. Instead, he commenced this suit on November 3, 1989, seeking a declaration that the procedural requirements of Section 6703 are unconstitutional as applied to him and an injunction to restrain the government from collecting the assessments (Pet. App. 6a-7a).

The district court denied petitioner's motion for a preliminary injunctive and dismissed the case for lack of subject matter jurisdiction (Pet. App. 2a). The court held that the Anti-Injunction Act, 26 U.S.C. 7421, prohibits the maintenance of petitioner's action

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number of investors to whom taxpayer had sold the shelter program in each separate year (Pet. 6).

to restrain the assessment or collection of any tax, including tax penalties under Sections 6700 and 6701 of the Code. The court further held that taxpayer had failed to demonstrate that he fell within the narrow judicial exception to the anti-Injunction Act because he had not established that it was certain that the government could not prevail on the merits of the penalties and had also not established that he would suffer irreparable injury absent an injunction (Pet. App. 3a). The court therefore dismissed the complaint for lack of subject matter jurisdiction (Pet. App. 1a).

The court of appeals affirmed, holding that petitioner's failure to demonstrate irreparable injury was fatal to his claim (Pet. App. 8a). While petitioner had broadly alleged that he would suffer financial ruin in the absence of injunctive relief, the court concluded that petitioner had failed to provide evidence adequate to support that claim (Pet. App. 8a-9a).

ARGUMENT

The court of appeals correctly concluded that petitioner's action to enjoin the collection of tax penalties assessed under Sections 6700 and 6701 of the Internal Revenue Code is barred by the Anti-Injunction Act. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. The decision rests upon the finding made by the two lower courts that petitioner had failed to meet his burden of proving that he would suffer irreparable injury in the absence of injunctive relief. Further review of this factual determination is not warranted.

1. The Anti-Injunction Act, 26 U.S.C. 7421, provides in relevant part as follows:

PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

> (a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1) and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.[3]

This provision allows the United States to assess and collect taxes claimed to be due without judicial intervention and limits determinations of the appropriateness of such assessments to suits for refund. *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962); *Bob Jones University* v. *Simon*, 416 U.S. 725, 736 (1974). The Act recognizes "the Government's need to assess and collect taxes * * * with a minimum of pre-enforcement judicial interference." *Bob Jones University* v. *Simon*, 416 U.S. at 736; *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752 (1974).

The bar against a suit seeking to restrain the assessment or collection of taxes applies to the penalties provided by Subchapter B of Chapter 62 of the Code, which includes the penalties involved in this case. Section 6671(a) provides that the penalties provided

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[3] Sections 6212(a) and 6213(a) of the Code relate to assessments entered in violation of the deficiency procedures of the Code. Sections 6672(b) and 6694(c) allow taxpayers to obtain stays of certain penalty collection proceedings if certain requisites are met. Section 7426(a) and (b)(1) allows district courts to issue an injunction in wrongful levy cases under certain circumstances. Section 7429(b) relates to district court review of jeopardy assessments. None of these specific statutory exceptions is relevant to this case.

in Subchapter B "shall be assessed and collected in the same manner as taxes" and that "any reference in this title [the Internal Revenue Code] to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter." [4] 26 U.S.C. 6671(a). The prohibition of the Anti-Injunction Act against suits to restrain the "assessment or collection of any tax" (26 U.S.C. 7421(a)) thus applies directly to the penalties at issue in this case.

Because the relief sought by petitioner falls squarely within the prohibition of the Anti-Injunction Act, the district court lacked jurisdiction to grant injunctive relief unless petitioner's claims fall within the narrow, judicial exception to the Act recognized in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. at 7. That exception applies only when a taxpayer establishes: (i) that it is clear, based on the most liberal view of the law and the facts known to the government at the time of the suit, that "under no circumstances could the Government ultimately

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[4] Petitioner, citing *Lipke* v. *Lederer*, 259 U.S. 557 (1922), asserts that the penalties assessed against him are in the nature of a punishment and thus do not come within the bar of the Anti-Injunction Act (Pet. 19-21). *Lipke* applies only to "penalties" or "fines" designed as punishment for criminal violations of statutes (259 U.S. at 561-562) and not to civil penalties designed to deter abuses of the tax system and to compensate the government for the revenues lost through the abusive practices of those subject to the penalties. Such penalties are not punishment for criminal acts. See *United States* v. *Halper*, 490 U.S. 435, 442-443 (1989); *Helvering* v. *Mitchell*, 303 U.S. 391, 404-405 (1938). Moreover, as is discussed in the text, the Internal Revenue Code expressly defines the penalties at issue in this case to be "taxes" for all purposes under Title 26, which, of course, includes the Anti-Injunction Act.

prevail" on the issue of the taxpayer's liability for the taxes and (ii) that without an injunction taxpayer will suffer an irreparable injury for which there is no adequate remedy at law. *Ibid.* See *Bob Jones University* v. *Simon*, 416 U.S. at 736-737.

Petitioner failed to satisfy either part of this test, and his suit was therefore properly dismissed. Petitioner made no attempt to produce facts to establish that the government could not ultimately prevail on its assessments. Petitioner's recitation of his contentions (Pet. 25-29) demonstrates only that he may have defenses to certain of the numerous assessments; it does not provide clear proof that the penalties may not ultimately be sustained.[5] Petitioner's arguments thus fall far short of the showing required by *Williams Packing* and *Bob Jones University*.

Petitioner's claim that he has met the second part of the *Williams Packing* test rests on his assertion that he will be financially ruined if he is required to pay the assessments before obtaining a judicial determination of their validity (Pet. 21-25). Both of the lower courts held, however, that petitioner failed to establish any such claim, noting that "he has submitted no supporting documentation to prove his financial status" (Pet. App. 3a) and that "[o]ur independent review of the record has revealed no evidence of harm

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[5] The assertion (Pet. 28-29) that the assessments are barred by the applicable statute of limitations is a claim that petitioner may raise in a suit for refund under Section 6401(a), which provides that "the term 'overpayment' includes * * * any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." 26 U.S.C. 6401(a). The mere assertion of such a claim, moreover, does not, as petitioner suggests (Pet. 29), render the assessments void or establish that the government will not ultimately prevail on the assessments.

beyond 'mere financial hardship'" (*id.* at 9a). That fact-bound determination does not warrant further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985). Moreover, it is well established that evidence of financial hardship is not by itself sufficient to lift the bar of the Anti-Injunction Act. See *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. at 6; *Bob Jones University* v. *Simon*, 416 U.S. at 745.

2. Petitioner also claims (Pet. 10-19) that Sections 6700-6703 of the Internal Revenue Code violate due process (Pet. 10-19). This Court, however, has long held that due process is not violated by a statutory scheme that provides for judicial review of tax assessments in refund suits following payment or collection of the tax. See *Bob Jones University* v. *Simon*, 416 U.S. at 746 & n.20, quoting *Dodge* v. *Osborn*, 240 U.S. 118, 122 (1916) ("There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue after payment of the taxes and giving [the] right to sue in case of his refusal to refund are wanting in due process and therefore there is jurisdiction [to issue injunctive relief prior to the assessment or collection of any tax]. But we think it suffices to state that contention to demonstrate its entire want of merit." (brackets in original)).

In *Phillips* v. *Commissioner*, 283 U.S. 589, 595-597 (1931), this Court rejected a challenge to the constitutionality of the system under which taxes may be assessed and collected summarily without the opportunity for prepayment administrative or judicial review. The Court concluded that due process is satisfied in these circumstances by the adequate opportunity for a post-payment judicial determination of

the validity of the tax.[6] See also *Commissioner* v. *Shapiro*, 424 U.S. 614, 630-633 (1976); *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 758-760 (1974); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 (1972); *Boynton* v. *United States*, 566 F.2d 50, 53 n.2 (9th Cir. 1977) ("Assessments made without prior notice of deficiency are constitutionally valid, notwithstanding the fact that Tax Court jurisdiction is foreclosed and full payment of at least a divisible part of the assessment must necessarily precede a refund suit in District Court").[7]

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[6] Petitioner errs in relying (Pet. 11-14) on *Jolly* v. *United States*, 764 F.2d 642 (9th Cir. 1985). *Jolly* involved a suit for the refund of penalties imposed under Section 6702. The Ninth Circuit rejected the argument that Section 6703(c) violates due process by requiring a penalty to be paid before the penalty assessment may be reviewed on the merits. 764 F.2d at 645-647. In the penultimate paragraph of the *Jolly* opinion, the court noted that Section 6703(b) "accords [taxpayers] greater procedural protection than they receive when other taxes or penalties are assessed" by allowing them to obtain both administrative and judicial review of the assessment after paying only 15% (instead of 100%) of the assessment, and by placing the burden of proof on the Commissioner rather than the taxpayer as is the case with actions for the refund of other taxes. 764 F.2d at 646-647.

[7] Petitioner's claims for the return of subpoenaed records and for attorney's fees (Pet. 29-30) are not properly before the Court. The court of appeals correctly held that the return of the subpoenaed records mooted that issue (Pet. App. 7a n.2). Since petitioner lost on the merits in both courts below, he quite plainly was not entitled to attorney's fees under the statutes that allow an award of fees to the "prevailing party." 28 U.S.C. 2412; 26 U.S.C. 7430.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

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